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ALEXANDER L. STEVAS,
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82-754

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

Case No.

STATE OF FLORIDA,

Petitioner

v.

DANIEL LOWELL COLER,

Respondent.

Petition for Writ of
Certiorari to the
Supreme Court of Florida.

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QUESTION PRESENTED

I.

WHETHER, ON DECIDING THAT THE IMPOSITION OF THE DEATH PENALTY FOR "CHILD RAPE" IS CONSTITUTIONALLY INFIRM, THE FLORIDA SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED ONLY BY THIS COURT.

1) WHETHER THE STATE OF FLORIDA WILL BE PRECLUDED FROM PRESENTING THIS ISSUE TO THIS COURT IN THE FUTURE, THUS MAKING REVIEW IN THIS INSTANCE ESSENTIAL.

2) WHETHER THE STATE OF MISSISSIPPI WILL ALSO BE ADVERSELY AFFECTED IF THE ISSUE PRESENTED IS NOT HEARD BY THIS COURT.

3) WHETHER THE STATE OF FLORIDA, IN AN ATTEMPT TO PROTECT CHILDREN FROM SEXUAL EXPLOITATION, MAY IMPOSE THE DEATH PENALTY FOR CHILD RAPE IN THE EXERCISE OF THOSE POWERS RESERVED TO THE STATES, WITHOUT VIOLATING THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

II.

WHETHER THE FLORIDA SUPREME COURT HAS DECIDED A QUESTION IN A WAY WHICH CONFLICTS WITH A DECISION OF THE SUPREME COURT OF MISSISSIPPI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of Florida is as of this date unreported, but appears in the appendix hereto as (A-1-27).

JURISDICTIONAL STATEMENT

The Florida Supreme Court entered its judgment on May 13, 1982 (A-1-25). On August 31, 1982, it denied a timely filed petition for rehearing. (A-26) The Court's jurisdiction is invoked under 28 U.S.C. §1257(3) in that the Supreme Court of Florida is the highest court in the State of Florida in which a decision could be had and in its decision in the instant case it held a state statute unconstitutional on the grounds that it was repugnant to the Constitution of the United States; viz.: that so much of Section 794.011(2)

Florida Statutes (1977), which provides that whoever being eighteen years or older commits a sexual battery upon a person eleven years or younger, is guilty of a capital felony, punishable under Florida Statute 775.082, by death, violates the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

AMENDMENT VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FLORIDA STATUTE INVOLVED

Florida Statute 794.011 (1977) appears in (A-46-51). Section (2) thereof reads:

> (2) A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person 11 years of age or younger in an attempt to commit sexual battery upon said person

commits a capital felony punishable in ss. 775.082 and 921.121. If the offender is under the age of 18, that person shall be guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

Respondent was charged in a four count indictment with three counts of rape in violation of Section 794.01(1), Florida Statutes (1973), and one count of sexual battery in violation of Section 794.011(2), Florida Statutes (1975).

He filed a motion to dismiss the indictment on November 17, 1977, alleging inter alia, that the imposition of the death penalty for sexual battery violated the cruel and unusual punishment clause of the Eighth Amendment. The motion was denied.

At trial it was established that the victim Mary Danielle Coler was sexually battered by her father, respondent, "once

or twice" a week for a period of several years. The four counts included three counts for rape: on December 25, 1972 (victim 7 years old); between January 23, 1973 and June 1, 1973 (victim 7 years old); lastly between June 1, 1974 and September 1974 (victim 8 or 9). The sexual battery occurred between January 1, 1977 and March 31, 1977 (victim 11 years old).

Respondent was convicted on all four counts. He was sentenced to death for each of the four counts. The trial court based its sentence of death for the sexual battery on the finding that the sexual battery was committed in an <u>especially</u> heinous, atrocious or cruel manner. The trial court found that no mitigating circumstances existed.

On appeal the Florida Supreme Court vacated the death penalty on the ground that the sentence of death is grossly dis-

proportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the Eighth Amendment of the United States Constitution as cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED ONLY BY THIS COURT.

In Coker v. Georgia, 433 U.S. 584 (1977) the Court held that the imposition of the death penalty for the rape of an adult woman violated the Eighth Amendment. Left unanswered was whether imposition of the death penalty for "child rape" also violates the Eighth Amendment.

The Florida Supreme Court answered the question in the affirmative stating that ". . . a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and therefore

forbidden by the eighth amendment as cruel and unusual punishment." (A-1)

Thus, the Florida Supreme Court decided the question squarely and exclusively on federal constitutional grounds. There are several reasons why the question decided by the Florida Supreme Court is an important one which should be decided by this Court:

1. Unless the Court grants certiorari review in this case, the State of Florida will thereafter be effectively precluded from presenting this issue to the Court again. Subsequent cases involving the imposition of the death penalty under Florida's sexual battery statute will never reach this maturity. Only in cases in which the sentencing authority imposes the sentence of death could the issue arise. But, trial judges, in compliance with the Florida Supreme Court's decision, will never again impose the sentence of death

for the sexual battery of a child eleven years of age or younger.

2. A decision by the Court is not only important to the State of Florida and to the State of Mississippi which also has a statute imposing the sentence of death for "child rape,"[1]; but even more, to other states which may be desirous of enacting similar statutes and which may have hesitated because of the Court's deicison in Coker and the confusion which was generated by Furman v. Georgia, 408 U.S. 238 (1972).

[1]/Upshaw v. State, 350 So.2d 1358 (Miss. 1977); Coker v. Georgia, 433 U.S. 584, 595 (1977).

3. The plurality in Coker seemed to feel that since the death sentence for rape of an adult woman was a disproportionate punishment, an inquiry as to whether it served the legitimate ends of punishment was an invalid consideration (footnote 4, plurality opinion, Justice White). But "child rape" is unquestionably more outrageous. Its affects may be more traumatic and lasting, not only to the child, but the entire family and society. The Court has recognized that states do have an interest in protecting the welfare of children. Ginsberg v. New York, 390 U.S. 629 (1968). The form or degree of that protection is primarily a legislative function, Gore v. U.S., 357, 386, 393 (1958), which may, constitutionally, vary from state to state according to each state's varying needs and views. Rummel v.

Estelle, 455 U.S. 263, 282 (1980). Only when a punishment is so grossly disproportionate to the crime under all circumstances can it be said that the legislature has exceeded its prerogative. Thus it is important for the Court to decide whether - regardless of the circumstances of the crime or the character of the accused - the sentence of death for "child rape" is so grossly disproportionate that it outweighs any legitimate end of punishment.

This Court has recently recognized the states' legitimate interest in protecting the physical and psychological well-being of minors. New York v. Ferber, ____ U.S. ___, 73 L.Ed.2d 1113 (1982). This Court elaborated on this theme in Ferber and stated:

> The prevention of sexual exploitation and abuse of children constitutes a government objective of

surpassing importance.

Ferber at 1123.

In Ferber, this Court declined to second guess the legislative judgment inherent in the New York law prohibiting "child pornography." Florida is no less entitled to its statute which attempts to prevent the sexual battery of children by imposing the harshest penalty. If this Court genuinely feels that children are entitled to special protection from sexual exploitation, then the question presented by petitioner herein should be reviewed.

II. THE SUPREME COURT OF FLORIDA HAS DECIDED THE QUESTION IN A WAY WHICH CONFLICTS WITH A DECISION OF THE SUPREME COURT OF MISSISSIPPI.

In Upshaw v. State, 350 So.2d 1358, 1360 (Miss. 1977) the Supreme Court of Mississippi squarely rejected the contention that Coker precluded the imposi-

tion of the death penalty for ". . . rape of a female child under the age of twelve years. . ." In doing so, the Mississippi Supreme Court observed that this Court took great pains to limit its decision to the rape of an adult woman; that "at least six other times the majority opinion referred to the rape of an 'adult woman'." Manifestly, the decision of the Supreme Court of Florida in the instant case is in direct conflict with the decision in Upshaw. Upshaw holds that the death penalty for the rape of a female child under the age of 12 years of age is not grossly disproportionate to the crime; whereas the decision of the Florida Supreme Court in the instant case holds that it is, regardless the circumstances surrounding its commission.

The decisions of the Florida Supreme Court and of the Supreme Court of Missis-

sippi are irreconcilable. This irreconcilable conflict involving the Eighth Amendment is one that needs to be resolved by this Court. The Florida Supreme Court is not supreme on federal constitutional questions. That is the prerogative of this Court. Unless the court grants certiorari review the Florida Supreme Court will, in essence, become this court's uninvited surrogate on a matter involving an important federal constitutional question.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Writ of Certiorari to Mr. Tyrie A. Boyer, 3030 Independent Life Building, One Independent Dr., Jacksonville 32202, and to Ms. Melanie Hines, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, counsel for Respondent, by U.S. Mail, this day of October, 1982.

GREGORY C. SMITH
Assistant Attorney General
of Counsel

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SUPREME COURT OF FLORIDA

No. 54,250

DANIEL LOWELL COLER,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

[May 13, 1982]

PER CURIAM.

Coler was convicted and sentenced to death on three counts of rape of a child under eleven years and one count of sexual battery of a child eleven years or

younger.[1] Each count charged Coler with a separate episode of sexual battery on his daughter during the years 1972 through 1977. At the outset we vacate the death sentence since we have held in Buford v. State, 403 So.2d 943 (Fla. 1981), that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the eighth amendment as cruel and unusual punishment. Further we find that although there is sufficient evidence in the record, if believed, to support a conviction, we find that Coler was convicted in part by the use of irrelevant, unfairly prejudicial testimony which

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[1] The first three counts were based on § 794.01(1), Fla. Stat. (1971). The fourth count was based on § 794.011(2), Fla. Stat. (1975).

deprived him of a fair trial. We therefore reverse his convictions and order a new trial.

After Coler and his wife were divorced early in 1972, the three Coler children lived half the time with each parent. In July 1972 Coler obtained exclusive custody of the children, and they lived with him until late in 1974 when their mother regained custody. Coler was granted weekend visitation privileges with the children. In March 1977 the children complained that they did not want to visit their father. When pressed by their mother for a reason, one of the children indicated that their father had been sexually abusing the daughter. Following an investigation by the Division of Family Services, including a gynecological examination, the state attorney's office sought and received an indictment.

In addition to the testimony of the children concerning the four specific incidents of sexual battery, the state introduced testimony from the children, over objection, of other examples of Coler's deviant sexual behavior. They testified that Coler had the children watch from the doorway as he fondled a woman, that they or the neighborhood children could use his bed for sexual intercourse, that he told one of his sons to have sex with three women he brought home, and that on a visit to Michigan he made the children eat a cucumber which, just prior thereto, he had inserted into the daughter's rectum. None of this testimony was relevant to prove a material issue of the indictment. It served only to prove the defendant's bad character and was obviously prejudicial.

For a discussion of evidence of a

collateral nature we return to the fine opinion of Justice Thornal in Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847 (1959). That case states the general rule that similar fact evidence is admissible if relevant to a fact in issue even though it also points to the commission of a separate crime. Such evidence is inadmissible, however, if its sole relevancy is to establish bad character on the part of the accused. The prosecution is not permitted to present evidence simply to show a defendant's bad character or to show a disposition toward the commission of the crime charged. If relevant, the bad character exception may have to yield if incidental to a relevant issue, but, when there is no relevance except bad character, it is error to allow such evidence.

To be relevant, evidence must prove or

tend to prove a fact in issue. The state argues that the objected-to evidence proves Coler's state of mind[2]. Coler's state of mind, however, was not an issue. State of mind is not a material fact in a sexual battery charge, nor is intent an issue. Cf. Askew v. State, 113 So.2d 219 (Fla. 1960) (specific intent is not the essence of the crime of rape). In this instance the state overstepped the threshold of responsible prosecution with the introduction of this loathsome and despicable testimony. We cannot say it did not affect the jury's verdict.

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[2] We make no judgment as to whether the evidence actually tends to prove or disprove Coler's state of mind. Further, we do not comment on whether the introduction of such testimony should be excluded as a result of weighing its probative value against any unfair prejudice. See § 90.403, Fla.Stat. (1979) (not applicable to the trial of this cause.)

Coler raises other issues, but most of these alleged errors are unlikely to reoccur in a new trial, and we decline to address them. In any event we are unable to discern other clear reversible error on the issue of guilt.

The convictions and sentences are vacated, and Coler is granted a new trial.

It is so ordered.

BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur ADKINS, J., Dissents with an opinion with which SUNDBERG, C.J., Concurs, ALDERMAN, J., Dissents with an opinion with which ADKINS, J., Concurs NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.
ADKINS, J., Dissenting.

I dissent.

It is true that the evidence of other sexual offenses, just as any evidence tending to prove guilt, may serve to prove defendant's bad character and be prejudicial. On the other hand, the evidence was relevant to show a state of

mind or a pattern of criminality.

Ross v. State, 112 So.2d 69 (Fla.3d DCA 1959), was a prosecution for assault, in a lewd and lascivious manner on a girl under fourteen years of age. In affirming the conviction, the court said:

> We hold against the contentions of appellant regarding the testimony of the other girl who at the time or times involved was 10 or 11 years old. Testimony of the latter to the effect that appellant had fondled her in a lewd and lascivious manner was presented by the state to show the character of the deed as to motive, intent and absence of mistake, for which it was relevant and admissible, under Talley v. State, 160 Fla. 593, 36 So.2d 201; and Williams v. State, Fla.1959, 110 So.2d 654.

Id. at 70.

> While the record may permit conclusion that the earlier occasion of fondling the other girl was as much as two years before the date of the offense involved here, counsel for the defendant on cross examining the girl established that the defendant engaged in such condict with her on a continuing series of

> occasions, the last of which was said by her to have taken place as late as November of 1957, approximately six months prior to the offense charged here.

Id. at 70.

The defendant in Summit v. State, 285 So.2d 670 (Fla.3d DCA 1973), was convicted and sentenced for lewd and lascivious conduct upon a female child under the age of fourteen years. On appeal defendant contended that the trial court committed error in admitting into evidence testimony concerning prior sexual offenses with the victim and the victim's sister. In affirming the conviction the court said:

> [W]e find the testimony of the victim and her sister regarding prior similar conduct on the part of the defendant with them to show the character of the deed as to motive and intent to be relevant and admissible. Therefore, we hold the trial court to be correct in denying defendant's motion for mistrial on the grounds that the above testimony was admitted improperly.

Id. at 670 (Emphasis supplied).

Gossett v. State, 191 So.2d 281 (Fla. 2d DCA 1966), was an appeal by a husband and wife from a conviction of assault and rape upon a female under the age of fourteen years. In affirming the conviction the court said:

> The only possible error here is whether it was proper for the trial court to permit the introduction of evidence of similar illicit acts, imposed by the appellants on the children, that occurred prior to the time of the act in question.

Id. at 282.

> We conclude that the trial judge had authority under Williams v. State, . . . [110 So.2d 654 (Fla. 1959)], and Talley v. State, . . . [36 So.2d 201 (Fla. 1948)], to permit the evidence of former acts of the two defendants in connection with the children involved in the instant case to show a pattern of criminality that makes the prior acts relevant to the commission of the acts in question.

Id. at 283 (emphasis supplied).

Cantrell v. State, 193 So.2d 444 (Fla.2d DCA 1966), was a prosecution for the commission of a lewd and lascivious act on an eight-year-old female child. The defendant was convicted and on appeal claimed error in the admissibility of evidence of similar acts committed by defendant with other female children. In affirming the conviction the court said:

> During the course of the trial, the state was allowed to present the testimony of two other female children to the jury. These two witnesses testified essentially that defendant had on previous occasions improperly fondled them while in the swimming pool. Because of the age of these children, we will not repeat their exact testimony. Suffice it to say that it clearly and unequivocally established a course of conduct in the commission of the crime charged in the instant case.

Id. at 445 (emphasis supplied).

The defendant in Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976), was convicted of the rape

and murder of a thirteen-year-old female. The trial judge admitted testimony that defendant and another man attempted to engage in anal intercourse in the hour preceding the rape and murder of the victim. In affirming the conviction this Court said:

> [W]e hold that the circumstances surrounding the earlier unfulfilled sexual act were relevant to establish the state of mind of appellant and the motive for the assault on the victim occurring only a short time thereafter. Such evidence also was relevant to rebut alibi testimony. The trial court did not err in admitting such testimony.

Id. at 438 (emphasis supplied.)

In Cotita v. State, 381 So.2d 1146 (Fla.1st DCA 1980), review denied, 392 So.2d 1373 (1981), the defendant was convicted of committing a lewd and lascivious act on his five-year-old daughter and he appealed. At trial, the victim and her brother, who was present at

the time of the commission of the offense charged, testified that defendant committed the offense on the day in question. Over defendant's objection, the state presented the testimony of a neighborhood child who testified that defendant had committed the same type of sex act on her and her young sister. In affirming the conviction, the court said:

> The evidence here was relevant to the alibi defense and in addition to establish "a pattern of criminality, a category of admissibility recognized by the Florida Supreme Court in The Williams Case and in Ashley v. State, 265 So.2d 685, 693 (Fla.1972). Evidence of prior illicit sex acts with the same children involved in the assault and rape prosecution was held properly admitted "to show a pattern of criminality" in Gossett v. State 191 So.2d 281, 283 (Fla.2nd DCA 1966) [.]

Id. at 1147 (footnote omitted).

In Gibbs v. State, 394 So.2d 231 (Fla.1st DCA 1981), the defendant was

convicted of lewd, lascivious, and indecent assault upon a child. He appealed contending that evidence of prior sex acts committed by defendant against his stepdaughter was improperly admitted. This evidence was held admissible, the court saying:

> The existence of a lustful attitude toward his stepdaughter, proven by prior sexual assaults, makes it more likely or probable that the appellant possessed a similar state of mind toward his stepdaughter on the date of the alleged offense. This is relevancy beyond mere propensity.

Id. at 232.

In Whiteman v. State, 343 So.2d 1340 (Fla.2d DCA), cert.denied,353 So.2d 681 (1977), defendant was convicted of three counts of involuntary sexual battery. The victim was his niece who was seventeen years old. He had custodial control. In affirming the conviction the court said:

> The niece was permitted to testify,

over objection, to other occasions of sexual intercouse with the appellant (other than those specified in the informations) which had occurred over a lengthy period of time, the first of which occurred when she was 9 years old. She also testified to numerous instances of being handled and fondled by the appellant, being forced to give him baths, reading pornography aloud at his insistence and submitting to other types of sexual by-play (again at various times other than the occasions specified in the charges).

The court below ruled such testimony admissible at a hearing in advance of the trial for the purpose of deciding the admissibility question. In his ruling the trial judge stated:

> The entire relationship between the parties, that is, between the defendant and the alleged victim is relevant and material. Anything that went on between them in view of the allegations of the information that he [the appellant] was exercising this authority over her, anything going to that point, the Court finds it relevant, even though it may also indicate some other wrongdoing, but it is relevant.

Id. at 1341.

Appellant's continuing course of sexual aberration in reducing his legal ward to a veritable automaton was clearly relevant to the manner in which his parental authority over her had been

> exercised so as to reduce the niece to the status of a sexual plaything. Nothing is more relevant than the milieu in which the victim was reared by her legal guardian and her will or freedom to consent effectively vitiated.
>
> Finally, this court is well aware of the fact that the introduction of evidence of collateral crimes tends to impress upon the minds of the jurors that the defendant has a propensity to commit crimes. Beasley, supra at 286. See C. McCormick, Evidence § 190 (2d ed. 1972); 1 J. Wigmore, Evidence § 194 (3d ed. 1940). Almost any case wherein such evidence is allowed must, of necessity, have such a quality. Nevertheless, where such is not the sole purpose of admitting the evidence and the similar fact evidence is relevant to prove a material fact in issue, admission is not unduly prejudicial. Green v. State, 190 So.2d 42 (Fla.2d DCA 1966).

Id. at 1343.

Defendant Coler was charged with four separate episodes of sexual battery on his daughter who was under eleven years of age during the years 1972 through 1977. His alleged conduct with his daughter was not normal, but that of a sexual deviant. Although the evidence certainly proved

defendant's bad character and was obviously prejudicial, it was nevertheless admissible to prove motive, state of mind, or pattern of criminality.

It would be impossible to prove beyond a reasonable doubt the four isolated instances of sexual battery over a course of five years by relying on the testimony of a child. There must be corroboration. Other acts of sexual abuse during this period of time would be admissible, whether they are directed to the victim or to others. The rule regarding evidence of a collateral nature were thoroughly explained in Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847 (1959). After examining the numerous authorities construing Williams v. State, I believe that the majority has suffered from semantic aphasia.

Of course, the death penalty could not

be imposed. Buford v. State, 403 So.2d 943 (Fla. 1981). SUNDBERG, C.J., Concurs ALDERMAN, J., dissenting.

I disagree with the majority holding that Coler's convictions for three counts of rape of a child under eleven years and one count of sexual battery of a child eleven years or younger should be reversed because the trial court permitted evidence of other sexual offenses by Coler. Justice Adkins, in his dissent, is correct in concluding that this evidence was admissible because it was relevant to prove motive, state of mind, or pattern of criminality. Furthermore, in my view, the trial court was completely justified in finding that Coler's offenses were especially heinous, atrocious, or cruel. The court said:

> The Defendant is the father of the following three children: Mary Coler, the victim, born July

20, 1965; Arthur Coler, born October 9, 1963; and Christopher Coler, born June 11, 1962. Defendant and his wife were divorced in 1972. The three children lived with their mother at their residence on Cherokee Villa Lane in Jacksonville until the Defendant moved into said residence and the mother moved out, took the furniture and moved into an apartment in Jacksonville. The said children continued to reside at the Cherokee Villa Lane residence with their father who purchased new furniture for the home. The first time Defendant raped his daughter Mary was after the mother moved out and before Christmas, 1972. The daughter was then seven years old. He forced her to perform fellatio on him, after which he forced her to submit to sexual intercourse. This occurred approxmately every week or every other week thereafter. The bleeding which she suffered as a consequence subsided after approximately one or two months. She, of course, suffered pain from these attacks by the Defendant and testified that she would scream but that the Defendant would usually have his hand or fist up to her mouth and that he would hit or strike her. Defendant's son, Christopher, testified that he occasionally would hear Mary's screaming coming from Defendant's bedroom.

Mary specifically recalled that on Christmas night, 1972, he again raped her after they had returned home to the Cherokee Villa Lane residence after having visited Defendant's wife's residence in Fernandina, the Defendant having since remarried. This attack was similar to the first which occurred as aforesaid.

Another specific incident testified to by the Defendant's daughter and son, Christopher, occurred two or three months after Christmas, 1972, again at the Cherokee Villa Lane residence. On this occasion, Defendant got Christopher out of his bedroom and forced him to come into Defendant's bedroom to watch while Defendant again raped his daughter. As this was occurring, Christopher, then ten years old, attempted to use the telephone to call the police but Defendant prevented this by striking his son. The son returned to his bedroom. A short time later that same night, Defendant entered Christopher's room and ordered him to have sexual intercourse with his sister. When the son refused, Defendant held a pair of scissors up to his penis and threatened to amputate it. Defendant then performed fellatio on his son and forced his son to have sexual intercourse with his daughter. Some time prior to this occasion,

Christopher testified that he recalled walking into Defendant's bedroom and observing bloody towels and sheets on Defendant's bed.

The children continued to live with the Defendant until a few months after the summer of 1974. During this time, the Defendant continued to attack his daughter in the same manner as the first occasion, that is, by first making her perform fellatio on him and then raping her. The frequency of such assaults was estimated by the daughter at approximately every week or two. Christopher testified that frequently when he would get up in the morning to leave for school, he would see his sister on top of the Defendant in Defendant's bed and that the Defendant would shove her off when he saw Christopher.

Another instance which Defendant's daughter specifically recalled was an assault which occurred during the summer of 1974. She and her brother, Arthur, were visiting their mother at the apartment complex where the mother lived. Mary and Arthur were at the swimming pool when the Defendant arrived at the complex and dragged Mary off to his car, took her to his home and again attacked and raped her in the same manner as aforesaid.

Shortly after the summer of 1974, the children's mother obtained custody of them at which time they moved back to live with her. Pursuant to the Defendant's visitation rights, the children would visit Defendant every other weekend. The Defendant continued to rape his daughter on a regular basis until March, 1977. In March, 1977, a few weeks before Defendant's arrest on the subject charges, Mary, Arthur, and Christopher went to Marineland with the Defendant. After returning to Jacksonville, they went to Defendant's residence at Cherokee Villa Lane where Defendant again raped his daughter. This was the last time he attacked her.

In March, 1977, Christopher revealed to his mother and stepfather what had been occurring during the past several years relative to Defendant's aforesaid activities. This was reported to the police and Defendant was arrested. Defendant fled the jurisdiction and went to Pago Pago, American Samoa. Subsequently, he waived extradition and was returned to Jacksonville to stand trial.

Defendant's daughter was taken to University Hospital in Jacksonville on March 28, 1977 for a pelvic examination. Dr. Guy Benrubi, chief resident for

obstetrics and gynecology examined her at that time. At the trial, the Court found him qualified to testify as an expert witness in the field of obstetrics and gynecology. Dr. Benrubi testified that, upon his examination of Mary, he discovered a complete absence of the posterior hymenal ring and a great deal of scarring on the posterior fourchette, the aspect of the entrance of the vagina immediately next to the hymenal ring. This was not a congenital anomaly. Dr. Benrubi stated that, in his opinion, this condition was caused by the repeated penetration of the vagina at an early age by some object equal or greater than the diameter of the vaginal entrance at a time when the vagina was not ready to receive such object, that is, at a time pre-puberty when there was no estrogen circulating in the child's body to make her vagina pliable. Dr. Benrubi testified that he had never before seen as much scarring as he did on his examination of this child.

Even though I agree with the trial court's findings as to aggravating circumstances and lack of mitigating circumstances, I find that the death sentences imposed for these offenses of

rape and sexual battery must be vacated. Recently, in Buford v. State, No. 54,010 (Fla. July 23, 1981), we held that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the eighth amendment as cruel and unusual punishment.

I would affirm the convictions, but I would remand to the trial court to reduce the death sentences to life sentences with a mandatory term of twenty-five years' imprisonment. The trial court, of course, has the discretion to make these life sentences run consecutively.

ADKINS, J., Concurs

An Appeal from the Circuit Court in and for Duval County, Florida
Ralph W. Nimmons, Jr., judge - Case No. 77-1833-CF

Tyrie A. Boyer of Boyer, Tanzler, Blackburn & Boyer, Jacksonville, Florida; Margaret Good, Louis G. Carres and Thomas S. Keith, Assistant Public Defenders, Tallahassee,

Florida,

for Appellant

Jim Smith, Attorney General, and Doris E. Jenkins, Gregory C. Smith and Syd Johnston, Assistant Attorney General, Tallahassee, Florida,
for Appellee

SUPREME COURT OF FLORIDA

TUESDAY, AUGUST 31, 1982

DANIEL LOWELL COLER,

Appellant, CASE NO. 54,250

-v- Circuit Court No. 77-1833-CF
(Duval)

STATE OF FLORIDA,

Appellee.

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellee, and responses thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur, ALDERMAN, C.J. and ADKINS, J., dissents

A True Copy TC
cc: Hon. S. Morgan Slaughter,
TEST: Clerk

Hon. Ralph W. Nimmons, Jr., Judge

Sid J. White
Clerk, Supreme Court

Gregory C. Smith, Esquire
Melanie Hines, Esquire
Tyrie A. Boyer, Esquire

By: /s/ Tanya Carrol
Deputy Clerk

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LOWELL COLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

POST OFFICE BOX 671
TALLAHASSEE, FLORIDA, 32302
(904) 488-2458

ATTORNEYS FOR RESPONDENT

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LOWELL COLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether the imposition of the death penalty upon a person of 18 years or older for the sexual battery of a child of 11 years or younger is disproportionate to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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OPINION BELOW

The opinion of the Supreme Court of Florida has been reported as Coler v. State, 418 So.2d 238 (Fla. 1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

B

The Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C

Article I, Section 17, Florida Constitution:

> Excessive punishments. --Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

D

Section 794.011(2), Florida Statutes (1975):

> (2) A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in ss. 775.082 and 921.141. If the offender is under the age of 18, that person shall be guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, with the following additions:

The Florida Supreme Court not only unanimously vacated the death sentence; it also vacated the judgments of guilt because of a violation of the rule of similar fact evidence as promulgated by its previous opinion in Williams v. State, 110 So.2d 654 (Fla.), cert.den., 361 U.S. 847 (1959), and as codified after Respondent's trial by Section 90.404(2)(a), Florida Statutes (1981) (A-3).

The Florida Supreme Court ordered a new trial on all counts (Petitioner's appendix at 7a; 418 So.2d at 239). The mandate of the Florida Supreme Court issued on October 4, 1982 (A-1). Petitioner must bring Respondent to retrial within 90 days thereof as required by the state speedy trial rule, Florida Rule of Criminal Procedure 3.191(g) (A-2).

Petitioner sought a stay in this cause, but it was denied by Justice Lewis F. Powell on September 24, 1982.

REASONS FOR DENYING THE WRIT

A

THE SUPREME COURT OF FLORIDA DID NOT DECIDE A FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

The Supreme Court of Florida was confronted with the issue of whether death is cruel and unusual punishment for the rape of a child under eleven years of age by a defendant who is over eighteen. Respondent asserted in the trial court and the Florida Supreme Court that both the United States and Florida Constitutions prohibited such a severe punishment for the crime. Relying upon its prior decision in Buford v. State, 403 So.2d 943 (Fla. 1981), cert.den., 71 L.Ed.2d 319 (1982), the Florida Supreme Court held that death was indeed cruel and unusual punishment for the rape of a child eleven years old or younger. However, this decision does not present a federal question warranting this Court's review.

Article I, Section 17 of the Florida Constitution, like the Eighth Amendment to the United States Constitution, forbids cruel and unusual punishment. It reads:

> Excessive punishments.--Excessive fines, cruel or unusual punishment, attainder, forfeiture or estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Respondent raised the Florida constitutional provision in the trial court and on appeal. Reliance upon its prior decision in Buford does not mean that the case was decided solely on the federal constitution. Adopting the reasons of a federal court's interpretation of the federal constitution in interpreting similar provisions of the Florida Constitution does not raise a federal question for this Court to review.

Assuming the Florida Court's decision was based only upon the federal constitution, there is still no reason for this Court to review the question. Coker v. Georgia, 433 U.S. 584 (1977) gives more than adequate guidance regarding

the constitutionality of a death sentence for rape. Although this Court's holding in Coker was limited to the rape of an adult woman, the rationale behind the decision indicates that a death sentence for any rape runs afoul of the cruel and unusual punishment provisions. This Court's two step disproportionality analysis demonstrated that the values of contemporary society and the nature of the crime of rape cannot justify death as a penalty for any rape.

Society's values are mirrored in the various state's legislatures. As Petitioner noted (page 7 of petition), only Florida and Mississippi have statutes authorizing death for rape of a child. Petitioner's assertion that other states may have hesitated in enacting a death penalty statute for child rape because of confusion generated by Furman v. Georgia, 408 U.S. 238 (1972) is pure speculation. Florida, Mississippi and Tennessee did not hesitate. Section 794.011 (2), Florida Statutes (1975); §97-3-65, Miss.Code Ann. (1974); §39-3702, Tenn.Code Ann (1974).[1/] Additionally, the frequency of imposition of a death sentence for rape of a child shows jury's and court's reluctance to exact such an extreme penalty.[2/]

Turning to the nature of the crime, this Court's reasoning in Coker continues to supply adequate guidance. As abhorrent as the rape of a child may be, it still "does not compare with murder, which...[involves] the unjustified taking of human life." Coker v. Georgia, 433 U.S. 584,598 (1977). The majority opinion in Coker summarized this distinction as follows:

> Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but it

---

1/ Tennessee's statute has since been invalidated. Collins v. State, 550 S.W.2d 643 (Tenn. 1977).

2/ The Florida Supreme Court has reversed death sentences in three cases of capital rape prior to Respondent's case. Purdy v. State, 343 So.2d 4 (Fla.) cert.den., 434 U.S. 847 (1977); Huckaby v. State, 343 So.2d 29 (Fla.), cert.den., 434 U.S. 920 (1977); Buford v. State, supra.

> is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," 428 U.S. 187, is an excessive penalty for the rapist who, as such, does not take human life.

Id. The Florida Supreme Court correctly concluded that a death sentence for the crime of rape, regardless of the age of the victim, is disproportional to the offense.

Petitioner was unable to persuade this Court to accept review of the identical question in Buford, and its petition filed herein is remarkably similar to that which it filed in Buford. Moreover, in the interim, this Court in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982) clearly held that the death penalty is unconstitutional even for a participant in a felony-murder, who neither takes a life, nor intends to take a life, nor attempts to take a life. Thus, it is beyond belief that this Court would ever sanction the death penalty for a non-homicide.

B

THE DECISION OF THE SUPREME COURT OF FLORIDA SHOULD NOT BE REVIEWED BECAUSE RESPONDENT HAS BEEN GRANTED A NEW TRIAL.

The certiorari jurisdiction of this Court is narrowly defined by 28 USC §1257(3), and requires a final judgment. The opinion of the Supreme Court of Florida is not a "final judgment" because that opinion remanded this cause for a new trial.

This Court sometimes will review a judgment of a state appellate court which reverses a trial court and remands to the trial court, but only where that remand is for a ministerial purpose. Abood v. Detroit Board of Education, 431 U.S. 209, reh.den. 433 U.S. 915 (1977); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973). The reasons for requiring a final decision of a state court prior to Supreme Court review were stated in the latter case as follows:

> The finality requirement of 28 USC §1257 which limits our review of state court judgments, serves several ends: (1) it avoids peacemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Id. 414 U.S. at 159. See also California v. Green, 399 U.S. 149, 169-70 (1970).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida, 32302
(904) 488-2458

Member of the Bar of this Court

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LOWELL COLER,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Duval County, Florida

OCT 20 1982
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

WHEREAS, in that certain cause filed in this Court styled:

DANIEL LOWELL COLER vs. STATE OF FLORIDA

Case No. 54,250

Your Case No. 77-1833-CF

The attached opinion was rendered on May 13, 1982

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 4th day of October, 1982

Clerk of the Supreme Court of Florida.

* * *

(g) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the State or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from an appellate or other reviewing court which makes possible a new trial for the defendant, whichever is last in time.

90.404 Character evidence; when admissible.

* * *

(2) OTHER CRIMES, WRONGS, OR ACTS.—

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida have been hand delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to the Respondent, Mr. Daniel L. Coler, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, this 18 day of November, 1982. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA, :

Petitioner, :

v. :

DANIEL LOWELL COLER, :

Respondent. :

_____ :

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

DANIEL LOWELL COLER, respondent in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by respondent has been filed, with the brief in opposition to the petition, wherein respondent sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Respondent was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that respondent be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida, 32302
(904) 488-2458

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis as well as the attached Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis, have been hand delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to the Respondent, Mr. Daniel Lowell Coler, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, this 18 day of November, 1982. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

Case No.

STATE OF FLORIDA,

Petitioner

v.

DANIEL LOWELL COLER,

Respondent.

I, DANIEL COLER, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

Daniel Coler
DANIEL COLER

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of DANIEL COLER was subscribed and sworn to before me this 10th day of November 1982.

NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:
Notary Public, State of Florida at Large
My commission expires Sept. 27, 1984

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

DEC 10 PAGE 4

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

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vs.

DANIEL LOWELL COLER,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

POST OFFICE BOX 671
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ATTORNEYS FOR RESPONDENT

CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LOWELL COLER,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether the imposition of the death penalty upon a person of 18 years or older for the sexual battery of a child of 11 years or younger is disproportionate to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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ADDITIONAL REASONS FOR DENYING THE WRIT

C

PETITIONER HAS ENTERED A NOTICE OF NOLLE PROSEQUI IN THE STATE TRIAL COURT.

Respondent files this supplemental brief pursuant to Rule 22.6 to inform the Court of an intervening matter not available at the time respondent's brief in opposition was filed.

On November 19, 1982, petitioner entered a notice of nolle prosequi in the state trial court. Under Florida law, this means that petitioner has announced its intention not to prosecute respondent for the charges which are the subject of this petition for writ of certiorari. Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956). See the appendix attached to this brief. Although petitioner is not precluded from re-prosecuting respondent, he has been released from custody and it appears unlikely that he will be retried.

Accordingly, the undersigned contacted counsel for petitioner and suggested that this cause be appropriately dismissed pursuant to Rule 53. Counsel for petitioner declined to do so. However, it appears to the undersigned that no more of this Court's overburdened resources should be expended on what has become a frivolous petition for writ of certiorari with no case or controversy. Bucolo v. Adkins, 424 U.S. 641, 644 (1976) (Justices Stevens and Rehnquist, dissenting).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the brief in opposition, respondent requests that this Court deny the petition as legally frivolous.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Respondent

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

CASE NO. _____ DIVISION _____

OFFENDER NO. _____

STATE OF FLORIDA

VS:

_____

_____

INFORMATION FOR _____

_____

_____

_____

THIS IS TO CERTIFY THAT _____

_____

_____

_____

WITNESS my hand and seal of office at Jacksonville, Florida, this

DATE _____

S. MORGAN SLAUGHTER, CLERK

By: Valerie Kovar
Deputy Clerk

CR-M 4-76 FS-604

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Supplemental Brief In Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida has been hand delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 1st day of December, 1982. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

CASE NO. 82-754

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

-v-

DANIEL LOWELL COLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

QUESTION PRESENTED

WHETHER AFTER THE STATE OF FLORIDA NOLLE PROSSED THE PROSECUTION AGAINST RESPONDENT, A CASE OR CONTROVERSY STILL EXISTS WITH RESPECT TO THE ISSUES PRESENTED BY PETITIONER, THE STATE OF FLORIDA.

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ISSUE

QUESTION PRESENTED

WHETHER AFTER THE STATE OF FLORIDA NOLLE PROSSED THE PROSECUTION AGAINST RESPONDENT, A CASE OR CONTROVERSY STILL EXISTS WITH RESPECT TO THE ISSUES PRESENTED BY PETITIONER, THE STATE OF FLORIDA.

Respondent has presented the Court with an intervening matter, to-wit: the State's entry of a nolle prosequi in the case of State v. Daniel Lowell Coler in the Circuit Court of Duval County, Florida. While respondent factually states that this nolle prosequi was entered, he is equally correct in stating that this does not prevent prosecution.

The State of Florida, petitioner, can state that one of the principal reasons a nolle prosequi was entered was the refusal of the victim, respondent's daughter, to take the stand against respondent. That

particular situation can change and a further prosecution is not impossible.

Without retreating from the position that a prosecution of respondent is a possibility, it is clear that this question is one that will evade review if this Court does not grant a writ of certiorari. In compliance with the Florida Supreme Court's ruling, trial judges will not return sentences of death under § 794.011, F.S. (1977). Under the rationale outlined by this Court in Gerstein v. Pugh, 420 U.S. 103 (1974), the importance of this issue, coupled with the fact that it will evade review, requires that the writ be granted.

Lastly, this issue is one that must be decided by this Court because of the irreconcilable conflict between the Supreme Court of Mississippi, Upshaw v. State, 350 So.2d 1358 (Miss. 1977), and the Florida

Supreme Court on the same question of federal constitutional law. The Florida Supreme Court struck down the death penalty herein squarely on federal constitutional grounds stating: ". . . a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the Eighth Amendment as cruel and unusual." The Supreme Court of Mississippi, in Upshaw, supra, upheld the death penalty imposed under a nearly identical statute, stating that the penalty is not prohibited by the Eighth Amendment. The Florida Supreme Court is not supreme on federal constitutional questions. That is the preroyative of this court, and is the reason why this Court should grant the writ.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the Petition for Writ of Certiorari, petitioner would respectfully request that this Honorable Court grant the writ.

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, by hand-delivery, this 17th day of December 1982.

GREGORY C. SMITH
Assistant Attorney General

of Counsel